is offered for sale. For example, if a cable operator creates five tiers of five networks each, and places three of the top 30 in each tier, all twenty five networks would be pulled under the cap. If this is not the case, subscribers could be harmed by diluting traditional basic programming with less popular programming through retiering. This is precisely what Congress intended to avoid.

For cable programming services that do not fall under the "evasions" retiering harm provision -- i.e., programming not among the top 30 cable networks or new programming that is not bundled with top 30 programming -- we propose to use the system average cost per channel as the level above which rates are unreasonable. This is actually a lenient standard for incremental programming, since additional channels are traditionally well below system average cost.

Although monopolistic pricing and retiering lead to a specific concern about manipulation of tiers, the general problem with a global formulaic approach is reduction of quality. It is well recognized that given a formulaic, the easiest way to increase profits is to degrade quality. Therefore, if the Commission adopts a formulaic approach, it must establish quality standards. In addition to establishing an overall cap, and a presumption that above average cost pricing is unreasonable, in combination with above cap pricing, the Commission must be alert to degradation of service through reductions in programming.

One approach would be to weight the channels in the basic tier by an index of top 30 programming networks offered by the cable system. We call this the programming quality index. For example, suppose a system offered 15 of the top 30 networks in its basic or expanded basic tiers in 1989 (The maximum offered in basic or expanded tiers between 1984 and 1992). If it offered 15 or more of the top 30 under the global formulaic, it would be allowed to recover the full per channel price in the basic tier. If it reduced the number of top 30 networks to 10, it would only be allowed to recover 67 percent of the per channel price in the basic tier. Thus, there would be a programming quality index adjustment to basic rates.

Below average pricing (for purposes of determining unreasonable rates and bundle caps) would be calculated from the adjusted per channel cap.

Table VI-1 summarizes the global formulaic approach that we have proposed. There is, however, another consideration which the Commission must not forget, although we do not believe it should be directly incorporated into the formula.

TABLE VI-1:
CFA'S MODEL FOR GLOBAL FORMULAIC COST-BASED RATE REGULATION

BASIC SERVICE RATES

RMB = MONTHLY RATE IN BASE YEAR OF REGULATION
GNPPI = INCREASE IN GNPPI INDEX
RM93 = MONTHLY RATE IN 1993 ESTIMATED AS FOLLOWS:
RM93 = RMB X GNPPI:YEARB-1992
CNLN = NON-LEASED CHANNELS ESTIMATED AS FOLLOWS:
NUMBER OF ACTIVE CHANNELS IN YEAR N
- NUMBER OF LEASED ACCESS CHANNELS IN YEAR N
RC93 = PER CHANNEL RATE IN 1993 ESTIMATED AS FOLLOWS:
RC93 = RM93/CNL:93
ADRN = ADDITIONAL AD AND OTHER REVENUE PER SUBSCRIBER PER MONTH PER CHANNEL IN YEAR N, ESTIMATED AS FOLLOWS:
ADRN = (ADR:N - ADR:1992)
RCN = COST PER CHANNEL IN YEAR N ESTIMATED AS FOLLOWS:
RCN = [(RC93 X GNPPI:1992-N)
RCBN = BASIC PER CHANNEL RATE IN YEAR N ESTIMATED AS FOLLOWS:
RCBN = [(RC93 X GNPPI:1992-N) - ADR:N]
X (CNL:93/CNL:N)

CABLE PROGRAMMING SERVICES
AND RETIERING CONSIDERATIONS

MC = # OF MUST CARRY (OR RETRANSMISSION) STATIONS
T30N = NUMBER OF TOP 30 NAT. CABLE NETWORKS OFFERED IN YEAR N
T30I = TOP 30 AVAILABILITY INDEX
MAXIMUM NUMBER OF TOP 30 NAT. CABLE NETWORKS CARRIED AT ANY TIME BETWEEN 1986 AND 1992
TBB = TRADITIONAL BASIC BUNDLE CALCULATED AS FOLLOWS: MC + T30I
MMBP = MAXIMUM MONTHLY BUNDLE PRICE CALCULATED AS FOLLOWS: TBB x RCBN, NOTE THAT TBB INCLUDES ANY CHANNELS BUNDLED OR TIERED WITH T30 PROGRAMS
PQI = PROGRAMMING QUALITY INDEX, CALCULATED AS FOLLOWS: NUMBER OF TOP 30 NAT. CABLE NETWORKS CARRIED IN YEAR N/TBB

OVERALL RATE FORMULA

BMRN = BASIC MONTHLY RATE IN YEAR N AS FOLLOWS
BMRN = RCBN x PQI x # OF BASIC CHANNELS

SUBJECT TO THE CONSTRAINT MMBP IS NOT EXCEEDED

CABLE PROGRAMMING SERVICES

PRICES FOR OTHER CABLE PROGRAMMING SERVICE (I.E., THOSE NOT SUBJECT TO THE ABOVE CONSTRAINTS) ARE NOT UNREASONABLE AS LONG AS THEY ARE NO GREATER THAN RCN

2. OVERALL PROFITABILITY

The Congress expressed a concern about overall profitability and the contribution of other services to the overall costs of the cable operator. If the Commission adopts a global formulaic approach, it must adopt some general standard in order to assess general profitability and revenue streams. Absent detailed cost of cable programming services, it is necessary for the Commission and the public to have a profit standard that triggers scrutiny.

The obvious choice is to look at the relative contribution of various source of revenue. In 1986, basic service accounted for 53 percent of total cable operator revenues. The average for the 1980s, prior to deregulation was about 53 percent. In contrast, pay revenues were about 39 percent of total revenues prior to deregulation. After deregulation, the percentage of total revenue obtained from basic increased dramatically, to 62 percent in 1991, while the percentage obtained from pay declined to 28 percent. This is part of the abusive pricing pattern observed by Congress. The rate reductions we recommend would restore the historical pricing balance.

The Commission should be concerned if the percentage contribution of basic services to total revenues deviates from historical levels. If it goes to high, it suggests basic cable services are shouldering an unfair part of the burden. If it goes to low, cable programming services and per channel or per program services are highly profitable, and basic rates could, perhaps, be lowered.

3. THE IMPACT OF RATE REGULATION ON SUBSCRIBER BILLS

CFA's proposal is consistent with the dictates of the Act and the economic dynamics of the industry. It also produces a result which is reasonable and consistent with data available on the industry.

Figure VI-1 shows per channel rates for 1992 based on four estimation methodologies applied to national average rates.[91] All rates are stated in 1992 dollars. For the purposes of this analysis, we also assume a system which had one tier (overwhelmingly the case in 1984-86) and charged separately for equipment.

We observe actual basic cable rates of 51.6 cents per active channel. Rates on monopoly systems were 55 cents per channel. Rates from competitive systems yield an estimate of 39.9 cents per channel. Thus, for systems not subject to competition, we would expect a rate reduction of 15 cents per channel. National average rates would go down by more than 10 cents per channel.

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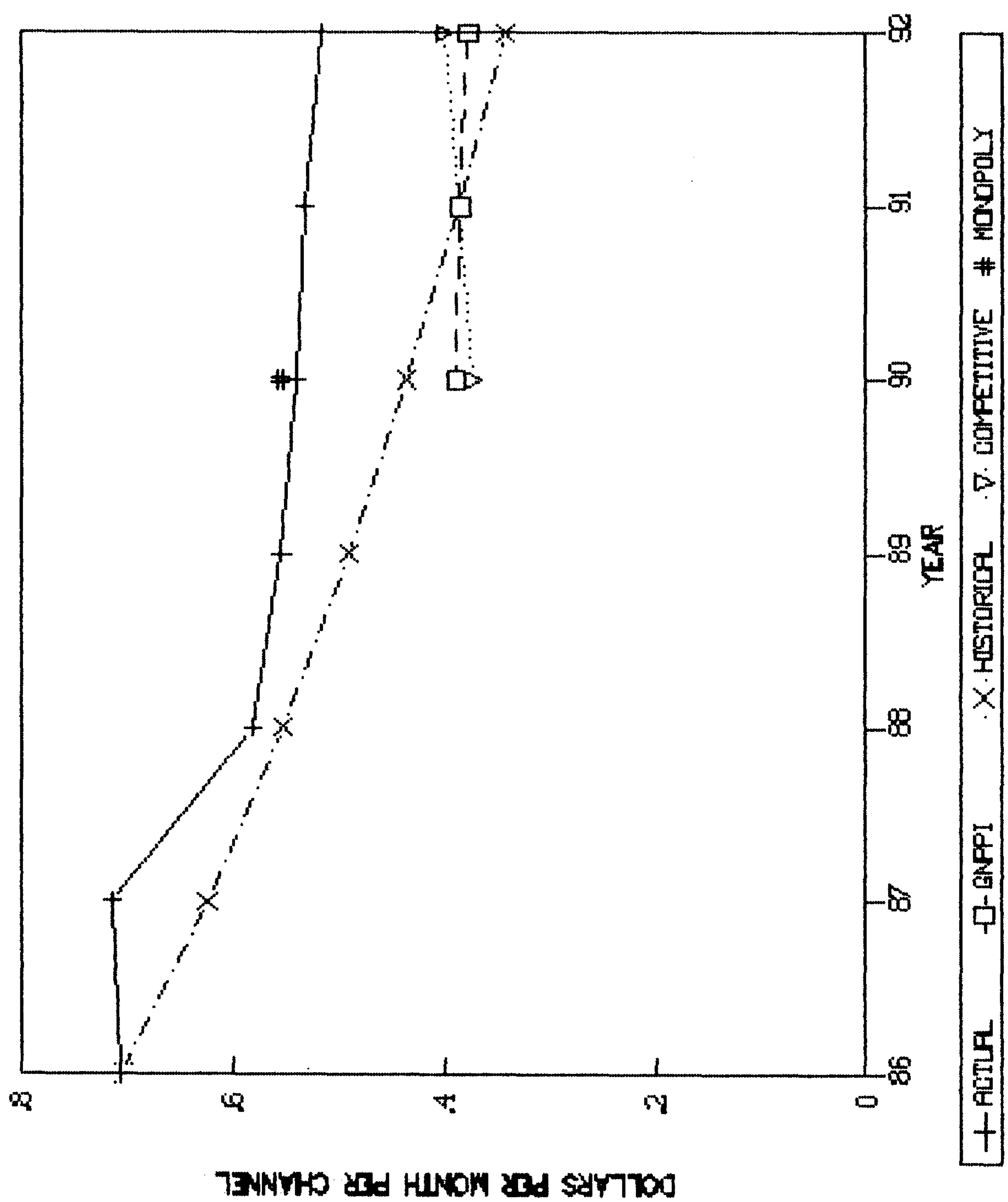
[91] See Section IV supra, for the sources of the data and derivation of the approaches.

FIGURE VI-1
PRICE PER CHANNEL ($ 1992, GNPPI DEFLATOR)



Other indicators of reasonable pricing correspond with this result. For example, the GNPPI inflator, as developed above and applied to national average 1986 rates and national average system characteristics, yields an estimate for a base rate in 1993 of 37.8 cents per channel. A projection of historical trends utilizing pre-1984 rates of price change applied to a 1986 base, yields an estimate of 34.2 cents per channel.

Thus, competition comparisons, historical trends, and a careful global formulaic approach all yield an estimate of reasonable prices for 1993 in the range of 34.2 to 39.9 cents per channel. The middle estimate is the GNPPI estimate at 37.8 cents per channel. We believe this is a strong indication that the Commission can adopt a global formulaic approach as outlined here for its initial approach to regulation.

At the system average size utilized above, basic rates should be approximately $13.80 per month, compared to the actual average of $18.85. This resulting reduction would be approximately 27 percent. The reduction of $5.05 per month is equal to about $3.3 billion per year. Since cable operators derive considerable revenue from sources other than basic monthly subscriptions, the reduction would be just under 17 percent of industry revenue.

This estimate does not take into account additional subscriber payments for those few systems which had expanded basic tiers in 1984-1986. This might add about $1.00 per month in rate reductions. However, reductions in equipment costs would likely offset this additional savings.

C. DISCUSSION OF GLOBAL FORMULAIC RATE REGULATION

This CFA proposal is consistent with the Act, the underlying economics of the industry, and would result in rates that are reasonable by several estimation methods. In addition, the Commission has recently adopted a comparable GNPPI approach for the telephone industry.[92] This is a useful background for our proposal in this case in two areas -- base rates and escalators.[93]

In the telephone situation, the Commission could presume that rates for services were reasonable because cost-based regulation was in place prior to the shift to a global formulaic, "price cap" approach. In this case, the global formulaic is

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[92] Federal Communications Commission, CC Docket No. 87-313.

[93] By recommending a global formulaic approach in this proceeding, we do not drop our objections to such regulation in the telephone industry (<u>see</u> Kimmelman and Cooper, Comments of CFA <u>In the Matter of Policy and Rules Concerning Rates for Dominant Carriers</u>, CC Dkt. No. 87-313, Oct. 19, 1987 and July 26, 1988). In this proceeding we recognize three fundamental differences: (1) the difficulty of going from a circumstance of no regulation to regulation, (2) the partial cost basis of regulation and (3) the Congressional mandate to lower regulatory burdens.

being instituted from a prior condition of no regulation whatsoever for a number of years. Price increases were not constrained by cost changes in any way, because cable systems were free to charge whatever the market would bear. Even in 1984 rates were not subject to rate of return regulation. Therefore, the Commission must carefully choose the base rates from which to start its indexing approach to ensure that monopoly excesses are eliminated. Failing to do so would frustrate the primary Congressional intent in enacting the 1992 Cable Act.

In the telephone "price cap" proceeding the Commission developed a productivity growth factor. The telecommunications sector has historically achieved productivity growth that led to price increases much lower than GNPPI. Ratepayers could not be denied their share of those productivity gains. A failure to do so would have resulted in unreasonable profits. Congress has the same fear for basic service cable subscribers. Therefore, in the case of cable the Commission must look closely at historical trends in price changes prior to deregulation.

Price trends prior to enactment of the 1984 Cable Act are crucial, since that law embodied a legislated set of rate changes (i.e., rates were allowed to rise 5 percent per year until deregulation took effect in 1986). As discussed in Section IV. supra, productivity growth was much higher in the cable industry than national GNPPI suggests. Subscribers enjoyed the benefits of those productivity increases in the form of declining prices and improving service. In the 1992 Cable Act, Congress intended for subscribers to receive these benefits once again.

The CFA approach establishes rates that are presumptively reasonable. Since the approach starts from rates that were subject to regulation, it is reasonable from a subscriber point of view. Since the approach allows cost increases that are reflective of general costs and industry specific economic factors, it is reasonable from the cable operator point of view as well.

The global formulaic approach is system specific in its key characteristics. That is, it uses the individual system average prices as the starting point. It uses the individual system number of channels. However, it uses national and industry averages for its inflator and advertising revenue adjustment. The use of national and industry averages will give individual systems an incentive to do better than those averages. It is in the nature of an indexing approach to allow those who "beat" the averages to keep their "winnings." Those who do not keep up bear the burden of their "losses." The rigors of the marketplace are at least this demanding and the Congress intended to capture this discipline to the benefit of subscribers.

If the Commission adopts a global formulaic cost approach, it must allow a challenge process that is symmetrical and balanced. Both cable operators and subscriber/intervenors should be allowed to make a showing, on the basis of cost or other data, that the global formulaic is allowing rates that are too high or too low. To evaluate such challenges, the Commission should apply the cost of service and accounting standards described in Appendices A and B of the Notice. Since such a cost analysis may result in rates far below or above the benchmark or challenger's desired price, and since challenges will involve costly data gathering, we believe neither cable operators nor consumers will have an incentive to challenge the global formulaic benchmark in most instances.

It should also be stressed that the formulaic approach is not cast in stone. The Commission must be alert to changes in programming or bundling practices that are abusive of consumers. For example, the Commission must be vigilant to prevent "evasions" like the renaming of a popular cable network to make such a network appear to be new programming. Or under TCI's proposed 500 channel multiplex system and Time Warner's "channelless"[94] experiment, the Commission may need to review its definition of channels and theirs to protect subscribers against new forms of evasion.

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[94] Farhi, "Time Warner Plans 2-Way Cable System," Washington Post, Jan. 27, 1993 at F1.

VII. RESPONSES TO SPECIFIC QUESTIONS RAISED IN THE NOTICE

Although Sections II. through VI. of CFA's comments respond to many of the questions raised by the Commission in the Notice, we wish in this section to highlight a number of key issues by reiterating our response to the Commission's concerns. In addition, this section responds to the Commission's questions about issues not discussed in our proposed model for rate regulation.

A. RATE REGULATION

1. GOALS OF THE ACT

CFA's proposed global formulaic rate model presents a simple, comprehensive and fair approach to implementing the intent of Congress in the Cable Act of 1992. Congress' paramount goal was to ensure reasonable rates. As noted above, reasonable is clearly defined in the Act, as preventing rates above those that prevail where effective competition exists. This excludes undue exercise of market power. We believe that case law and economic theory are entirely consistent with Congress' regulatory directives. The Commission is simply wrong when it:

> 1) suggests that there is any ambiguity in the definition of reasonable rates (paragraph 31);

2) asserts that other goals have equal weight with the overarching goal of ensuring that subscribers do not pay above-competitive market prices for basic and cable programming service (paragraph 31); and

3) indicates the Commission might leave basic rates higher than those in effect where effective competition exists (footnote 61).

Because the Commission seems to have missed the fundamental goal of the Cable Act, it then considers a series of outcomes that are totally at odds with Congress' intent. The Commission may not leave 1992 rates in place (footnote 61) since these include the monopoly rents Congress intended to eliminate.

It cannot create adjectives to describe monopoly excesses that dilute Congress' directives. Thus the Commission may not restrict its concern to "rates exceeding the benchmark price by a <u>significant</u> amount (paragraph 34, emphasis added).

Nor did Congress intend that "consumers would be protected <u>only</u> against rates <u>far</u> exceeding the general industry practice (paragraph 47 emphasis added)."

Moreover, it is ludicrous for the Commission to suggest that it would act only against rates in the "highest few percent (e.g. top 2-5%) (paragraph 46)." In fact, since competition prevails in less than one percent of cable systems, and rates in competitive systems are far below the national average, the

Commission should logically conclude the opposite: all rates above the lowest 2-5% may be unreasonable. As the Commission well knows (paragraph 41), Congress was absolutely clear when it stated in § 623 that the Commission's regulation has the goal of "protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."

2. BENCHMARKING

Our regulatory model, described in Section VI. supra, makes it clear that benchmarking based on a global, cost-based formulaic, is acceptable as an initial strategy (paragraphs 33 and 34). Furthermore, we believe a cost-based safety net (paragraph 61) should be developed simultaneously, as described in Appendixes A and B. However, it is absolutely crucial that the safety net be available to both cable operators and intervenors. The Commission's suggestion that a cost-based showing can be made only to raise rates above the benchmark (paragraphs 34 and 36) is unbalanced and unfair. Subscribers/intervenors must be able to show, by the same principles and methodologies, that benchmark rates are too high.

In addition, the Commission must be careful not to elevate its judgement that simplicity and administrative ease are somehow more important than Congress' directive to reduce rates to competitive market levels (paragraph 36). As CFA's proposed regulatory model demonstrates, there is no need or statutory basis for sacrificing market-driven rates in order to develop a simple, streamlined regulatory process.

The benchmark must also be based on a reasoned analysis that respects Congressional intent and is informed by an understanding of the economics of the industry. Virtually every one of the elements in CFA's proposal has been identified for comment by the Commission. However, we believe that the elements fit closely together and must be carefully chosen to complement one another in order to reach a reasonable outcome.

The Commission must choose a base year that eliminates excessive prices based on market power (paragraph 44). It must choose an inflator that reflects a reasonable estimate of cost changes (paragraphs 37 and 38). It must have a productivity adjustment (paragraph 52).

The benchmark that we have proposed avoids many of the problems of national average prices (paragraph 45). By starting with system specific data (prices for 1986 or earlier and traditional basic tier offerings), it renders a system-specific cost estimate. The Commission need not fear confiscation with this starting point for regulation (footnote 66). In fact, as we have shown, the outcome is reasonable by all three methods considered: comparison with competitive systems, historical projection, and GNPPI inflators. In the Hope and Bluefield decisions cited by the Commission (paragraph 57), reasonableness of outcome of the regulatory process is the ultimate test, and CFA's proposed regulatory model clearly meets all legal standards for regulation.

The global formulaic proposed above treats basic and cable programming services in a parallel manner (as suggested by the Commission in paragraph 92). We believe this is absolutely essential to meet Congress' goal of preventing evasions.[95]

If the Commission adopts CFA's approach, which drives prices to cost, there will be little if any danger of sharp rate increases on below-benchmark systems (paragraph 52). Because our approach starts from system specific prices prior to deregulation and allows general cost inflation adjusted for system expansion, there are very few cable systems which are likely to be pricing much below the cap.

[95] The Commission's reading of the Act's "evasion" provision is much too narrow (paragraph 126). The Act and the Conference Report clearly describe § 623 (h) as more than a "periodic review" program. Under § 623 (h) the Commission is given residual authority equal to its responsibilities under subsections (a)-(c), to prevent evasions, including retiering harm, on an on-going basis.

3. INFORMATION DISCLOSURE

Under the global formulaic benchmark model that CFA proposes, disputes over data disclosure are not likely to arise unless either a cable operator or subscriber/intervener challenges the benchmark. In that situation, we urge the Commission to require as extensive data disclosure to all participants to the dispute as is necessary to establish reasonable (not unreasonable) rates.

Particularly when a cable operator challenges a benchmark price, we believe the burden should be placed on that operator to demonstrate why any particular information involves trade secrets or confidential financial or commercial information that the Commission should not disclose to the public. Where a bona fide request for confidentiality is presented, CFA believes the Commission should take whatever steps are necessary (as described in paragraph 106) to both protect confidential material and ensure that legitimate intervenors have access to all data relevant to the rate dispute.

B. DEFINITION OF A MULTICHANNEL VIDEO PROGRAMMER FOR PURPOSES OF AN EFFECTIVE COMPETITION ANALYSIS

At paragraph 9 of the Notice, the Commission seeks comment on several important issues regarding what constitutes a multichannel video programming distributor under the 1992 Cable Act. Specifically the Commission seeks comment on how to calculate penetration for purposes of the effective competition analysis, and whether the Video Dialtone Services provided by telephone companies qualify as a multichannel video programming distributor.

CFA agrees with the Commission that to determine whether effective competition exists in a franchise area for purposes of § 623(l), the Commission must consider all qualifying multichannel video programming distributors cumulatively. The question turns to who is a "qualified" multichannel video programming distributor for purposes of this inquiry.

The Act uses a three part test to make this determination. First, the multichannel video programming distributor must offer a "comparable video service" to the one offered by the local cable operator.[96] Second, each multichannel video programming distributor, other than the largest one in the market, must offer its service to more than 50 percent of the households in the franchise area.[97] Finally, a combined total of more than 15 percent of the households in the franchise area must subscribe to

[96] § 623(l)(B).

[97] "...[E]ffective competition means that...the franchise area is...served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area..." See; § 623(l)(B)(i).

the programming service of the alternative providers to meet this requirement.[98]

CFA believes the Commission must carefully follow Congress' direction to consider only those multichannel video program distributors offering comparable video services to more than 50 percent of the households in the franchise area in making its determination. If the Commission is not diligent in its enforcement of this definition of effective competition, the result could be widespread "cream skimming" by alternative providers across the country. If each qualified provider is not required to offer its service to more than 50 percent of a franchise area to qualify for the effective competition analysis, the wealthiest areas could have a choice of several providers while leaving large portions of a franchise area without real choice in distributors.[99]

Also in paragraph 9 of the Notice, the Commission seeks comment on whether video dialtone service offered by local telephone companies would qualify as a multichannel video

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[98]See; § 623(l)(B)(ii). CFA believes a video dialtone service must provide comparable service to the cable company before the franchise authority or the Commission can consider whether it reaches 50 percent of the households in the franchise area.

[99]For instance, if the Commission treats the 50 percent requirement cumulatively, three alternative providers could each serve the same wealthiest 20 percent of the community and meet the 50 percent requirement together, while leaving 80 percent of the franchise area with no choice and the cable company without any rate regulation.

programming distributor under the Act. CFA believes it is too early in the development of the video dialtone technology to definitively determine if video dialtone qualifies as an alternative provider for purposes of the effective competition analysis. We do not yet know the nature and amount of programming that can be offered on this service. However, looking to possible scenarios for the evolution of the technology raises some significant concerns with respect to the goals of the 1992 Cable Act.

Under the Commission's 1992 video dialtone decision[100], cable television companies and telephone companies are permitted to joint venture in providing video dialtone services. This raises the issue of how video dialtone service will evolve. It is possible that video dialtone will evolve into a comparable service to those offered by cable television. A comparable service would be a functional alternative to cable service.[101] It is also possible, however, that it could be a service that is complimentary in nature to traditional cable television service. If so, video dialtone service would not be a true competitor, with comparable video programming, to the incumbent cable system.

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[100]CC Dkt. No. 87-266 (rel. July 16, 1992).

[101]CFA believes a reasonable definition of "comparable service" is critical to carry out Congress' intent. The Commission should look to the variety and number of channels offered and the number of programming hours offered by those channels to make this determination. It would not be necessary or appropriate for the Commission to look to program content when making its determination.

Another issue is raised by the Commission's decision to permit joint venturing by cable and telephone companies, if video dialtone service ends up offering comparable video services to the incumbent cable operator and qualifies as an alternative multichannel video programming distributor. One of the purposes of the Cable Act is to encourage competition and "the widest possible diversity of information sources and services to the public."[102] These goals are not met if the "alternative" provider is controlled or owned in any way by the dominant cable company in any given franchise area. CFA therefore believes that a video dialtone service that is a joint venture between local telephone and local cable companies should not qualify as an alternative provider for the effective competition inquiry under the 1992 Cable Act.[103]

As video dialtone service develops, the Commission will be asked to certify the local franchising authority's decision that

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[102]§ 601(4).

[103]The Commission asks in footnote 15 of the Notice whether a third party that uses a cable company's facilities to distribute its multichannel video service would qualify as an alternative provider under the Act. We believe it would not. The cable company would have a great deal of control and leverage against that third party which could permit it to control the nature of the content or services being offered by the third party. Furthermore, in the event the Commission finds in the alternative, CFA would argue that the multichannel video programming distributor also must offer comparable service to that being offered by the cable company to qualify.(i.e. equivalent channel capacity, hours of programming, etc.)

effective competition exists in a market.[104] When making this determination, the nature of the video programming and system capacity must be the decisive factors. The mere presence of multiple channels is not adequate, in and of itself, to meet this requirement.[105]

The definitions of video programming previously applied by the Commission will be helpful to decide if video dialtone offerings are "comparable" to cable services.[106] To be considered a competitor of a local cable system that provides comparable video services, a video dialtone service must present a broad range of programming available on a comparable number of channels and for a comparable number of hours per day as the

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[104] § 623(a)(2). "If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section."

[105] Unless the video dialtone service offers a similar number of channels and a broad variety of programming, the service could not qualify as a "comparable video service" for purposes of the effective competition inquiry in § 623(1)(B)(i).

[106] In the 1984 Cable Act, video programming was defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." This term was recently clarified by the Commission when it addressed the cable television/telephone company cross ownership rules. The Commission stated, "to the extent a service contains severable video images capable of being provided as independent video programs comparable to those provided by broadcast stations in 1984, that portion of the programming service will be deemed to constitute 'video programming'...". Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, FCC 92-327 (rel. August 14, 1992), 57 Fed. Reg. 41,106, ¶ 73, Sept. 9, 1992.

local cable television service.[107]

The Commission must make offering a comparable video service a *quid pro quo* to evaluating whether a video dialtone service is available to at least 50 percent of the franchise area and subscribed to by more than 15 percent, for purposes of an effective competition analysis. CFA believes this approach will assure that the intent of Congress is met, that consumers remain protected until true competition develops and that the development of video dialtone service is not unfairly impeded.

C. BASIC SERVICES MAY BE INCLUDED ON OTHER TIERS IN ADDITION TO THE BASIC TIER

At paragraph 13 of its Notice, the Commission recognizes an ambiguity created by language in the 1992 Cable Act that differs slightly from language found in the 1984 Cable Act. The question is whether use of the term "basic tier" in the 1992 Act effectively amends the definition of the term "basic cable service" from the 1984 Act. The Commission tentatively finds that it does.

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[107] A video dialtone service that offers only a few channels compared to the cable system would not qualify. By passing the 1992 Act, Congress found that five or six broadcast stations were not "competition" to cable service. From this, the Commission can presume Congress intended an alternative video service to more closely resemble the local cable system in the number and variety of channels offered. Similarly, a system which sell its time in 5 minute blocks throughout the day would not seem to qualify as a comparable service.

Under the 1984 Cable Act, basic cable service includes any and all tiers of service which include retransmission of local television broadcast signals as part of their offerings[108], a definition supported by the Federal Courts.[109] While the 1992 Act does not amend that provision, it does require cable operators to make available a "separately available basic service tier to which subscription is required for access to any other tier of service."[110] The ultimate question is whether it was Congress' intent to permit offering basic service on only one "basic service tier" or on additional tiers as well, at the discretion of the cable operator.

The Commission's tentative conclusion can be supported by a strictly literal reading of the language in the 1992 Act. However, CFA believes that it would not violate the statute to permit cable operators to offer basic service on other tiers in addition to the basic service tier. In fact, permitting basic service on other tiers in addition to the basic tier, if done carefully, would more accurately reflect a reading of the merger of the 1984 and 1992 provisions together.

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[108]1984 Cable Act, § 602(3). "'[B]asic cable service' means any service tier which includes the retransmission of local television broadcast signals."

[109]The Appellate Court for the D.C. Circuit held that under the 1984 Act, a tier of service that incorporates the basic tier is itself also a "basic tier service". However, a tier that could be added to the basic tier for a separate charge would not be considered a "basic tier service". American Civil Liberties Union v. FCC, 823 F. 2d 1554 (D.C. Cir. 1987).

[110]§ 623(b)(7).

To carry out its requirements under the Act, the Commission must make certain that all cable operators offer a basic tier of service which includes local broadcast stations, public, educational and governmental channels.[111] CFA believes permitting additional tiers to contain "basic tier programming", as long as they are reasonably priced, would not violate the law and would be in the interest of consumers and cable operators alike. This would give cable operators maximum flexibility in making marketing decisions and increase consumer choice.[112]

CFA's proposal better reflects Congress' intent than does the tentative conclusion offered by the Commission.[113] Permitting cable operators to offer basic service on other tiers in addition to the basic tier, keeps the Commission from being forced to choose between two valid provisions in the Cable Acts. The Commission's suggestion that if cable operators were permitted to offer more than "one basic tier", the anti-buy through provisions of § 623(b)(8) could be frustrated is not the case under the scenario advocated by CFA.

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[111]§ 623(b)(7).

[112]Under this regulatory model, cable operators could offer a small "basic tier" and a larger combination "basic tier" plus additional programming, as long as the price is fair. This gives cable operators the ability to better serve the needs of their particular communities without frustrating Congress' intent.

[113]The quote cited by the Commission in footnote 25 of the Notice supports CFA's position. The quote says, "The purpose of Section 3 is to create a tier of low cost basic cable service." House Report at 83. CFA advocates creating this tier, but also proposes permitting additional ones as well.